

**Ernie's Concrete Construction, Inc. and Laborers' Fringe Benefit Funds Joint Delinquency Committee.** Case 7-CA-33323

September 9, 1992

**DECISION AND ORDER**

BY MEMBERS DEVANEY, OVIATT, AND  
RAUDABAUGH

Upon a charge filed by Laborers' Fringe Benefit Funds Joint Delinquency Committee (the Delinquency Committee), the General Counsel of the National Labor Relations Board issued a complaint on June 26, 1992, against Ernie's Concrete Construction, Inc., the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act. Although properly served copies of the charge and complaint,<sup>1</sup> the Respondent has failed to file an answer.

On August 10, 1992, the General Counsel filed a Motion for Summary Judgment. On August 12, 1992, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

**Ruling on Motion for Summary Judgment**

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. The complaint states that unless an answer is filed within 14 days of service, "all the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board." Further, the undisputed allegations in the Motion for Summary Judgment disclose that the region, by letter dated July 16, 1992, notified the Respondent that unless an answer was received by July 30, 1992, a Motion for Summary Judgment would be filed.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

<sup>1</sup> Copies of the charge and complaint that were sent to the Respondent by certified mail were returned to the Regional Office marked "unclaimed." However, the Respondent's failure or refusal to claim certified mail cannot serve to defeat the purposes of the Act. See, e.g., *Michigan Expediting Service*, 282 NLRB 210 fn. 6 (1986).

**FINDINGS OF FACT**

**I. JURISDICTION**

The Respondent, a corporation, with an office and place of business in Detroit, Michigan, has been engaged in the construction industry as a concrete contractor. During the calendar year ending December 31, 1991, the Respondent provided services valued in excess of \$50,000 to Turner Construction Company, an enterprise within the State of Michigan. During the same time period, Turner Construction Company sold goods and/or performed services valued in excess of \$50,000 directly to customers located outside the State of Michigan. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that each of the State of Michigan Laborers' District Council (the District Council), Local 334 (Local 334) and Local 1076 (Local 1076) of the Laborers' International Union of North America, AFL-CIO (the Union) are labor organizations within the meaning of Section 2(5) of the Act.

The Associated General Contractors of America, Detroit Chapters, Inc. (AGC) is an organization composed of employers engaged in the construction industry and exists, in whole or part, for the purpose of representing its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including the District Council and Locals 334 and 1076.

**II. ALLEGED UNFAIR LABOR PRACTICES**

At all times since at least March 21, 1988, the Respondent has executed Interim and Supplemental Agreements with Local 1076 agreeing to be bound to successive agreements between AGC, the District Council, Local 334 and Local 1076, the most recent of which is effective by its terms from June 1, 1991, through May 31, 1992 (1991-1992 AGC agreement). On May 28, 1991, the Respondent executed an Interim and Supplemental Agreement with Local 1076 agreeing to abide by all the terms of the 1991-1992 AGC agreement and binding it to the terms and conditions of employment of the 1991-1992 AGC agreement. At all times since at least March 21, 1988, the District Council, Local 1076 has been the limited exclusive collective-bargaining representative pursuant to Section 8(f) of the Act of the employees in the following unit which is appropriate for purposes of collective bargaining within the meaning of Section 9(b):

All full-time and regular part-time laborers employed by the Respondent, but excluding guards and supervisors as defined in the Act.

At all times material, the Delinquency Committee has been designated to collect fringe benefit contribu-

tions and to administer the fringe benefit funds of the AGC agreements for certain fringe benefit contributions to be made to the Laborers' Fringe Benefit Funds by the Respondent on behalf of the unit employees.

By letter dated January 17, 1992, the Delinquency Committee, on behalf of the Union, requested the Respondent to make available for review its payroll records, including employee earning records, Forms W-2, W-3, 1099 and MESC Form 1017, for the period January 1989 to date so that the Delinquency Committee could audit the Respondent's compliance with the fringe benefit contributions provisions of the AGC agreements. The information requested is necessary for and relevant to the Union's performance of its function as the collective-bargaining representative of the unit employees. Since on or about January 17, 1992, and continuing to date, the Respondent has failed and refused to furnish the Delinquency Committee with the information.

Since on or about November 1991, the Respondent has unilaterally and without agreement with the District Council and Local 1076, failed and refused to apply the terms of the 1991-1992 AGC agreement to its unit employees by its failure to make all of the requisite fringe benefit fund contributions on behalf of its unit employees. These actions constitute unilateral modification of the 1991-1992 AGC agreement, without compliance with the provisions of Section 8(d) of the Act.

#### CONCLUSION OF LAW

By its failure to provide information to the Delinquency Committee and its failure to apply all the terms of the 1991-1992 AGC agreement by failure to make contractually required fringe benefit payments, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) by failing to make contractually required fringe benefit payments, we shall order the Respondent to make whole its unit employees by making all payments that have not been made and that would have been made but for the Respondent's unlawful failure to make them, including any additional amounts applicable to such delinquent payments as determined in accordance with the criteria set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from

its failure to make such required payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf'd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We shall also order the Respondent to furnish the requested information.

#### ORDER

The National Labor Relations Board orders that the Respondent, Ernie's Concrete Construction, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Failing and refusing to honor the terms of its 1991-1992 AGC agreement by failing to make contractually required fringe benefit payments.

(b) Failing to provide requested information to the Delinquency Committee.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

##### 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Honor the terms of the 1991-1992 AGC agreement by making contractually required fringe benefit payments.

(b) Make whole unit employees for any loss of benefits or other expenses suffered as a result of the Respondent's failure to make contractually required fringe benefit contributions.

(c) Provide the Delinquency Committee, on behalf of the Union, payroll records, including employee earning records, Forms W-2, W-3, 1099 and MESC Form 1017, for the period of January 1989 to date.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

(e) Post at its facility in Detroit, Michigan, copies of the attached notice marked "Appendix."<sup>2</sup> Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Re-

<sup>2</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

spondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

#### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with the State of Michigan Laborers' District Council, Local 334 and Local 1076 of the Laborers' International Union of North America, AFL-CIO, as the limited exclusive bargaining representative of our employees in the following appropriate unit:

All full-time and regular part-time laborers, but excluding guards and supervisors as defined in the Act.

WE WILL NOT fail or refuse to honor all the terms of our AGC agreement by failing to make contractually required fringe benefit payments.

WE WILL NOT refuse to supply the Laborers' Fringe Benefit Funds Joint Delinquency Committee, on behalf of the Union, all the information that is necessary and relevant to its role on behalf of the Union, the limited exclusive bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL honor all the terms and conditions of our AGC contract by making all contractually required fringe benefit contributions.

WE WILL make our unit employees whole for any loss of benefits or other expenses suffered as a result of our failure to make all contractually required fringe benefit contributions.

WE WILL provide the Delinquency Committee payroll records, including employee earning records, Forms W-2, W-3, 1099, and MESC Form 1017, for the period of January 1989 to date.

ERNIE'S CONCRETE CONSTRUCTION, INC.